SUPREME COURT U. S.
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IN THE

Supreme Court of the United States

October Term, 1967
No. 992

LEON W. SCALES, *et al.*,

Petitioner,

vs.

ROBERT A. RIDDELL,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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ROBERT A. RIDDELL,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the case of *Robert A. Riddell v. Leon W. Scales, et al.*, 22013-18, on August 28, 1967.*

Opinion Below.

There is no reported Opinion of the District Court. A copy of the Order Denying Motion to Dismiss by the Circuit Court of Appeals is printed in Appendix "A" hereto.

*Other petitioners than those listed in the caption are as follows: Allen J. Sutherland, No. 22014; A. Paul Sutherland, No. 22015; Mona J. Mason, No. 22016; Joseph Levikow, Jr., No. 22017 and Fred J. Howarth, No. 22018.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 28, 1967. Rehearing was denied on September 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

Question Presented.

Whether a consent or stipulated judgment is appealable.

Statute Involved.

There is no statute involved.

Statement.

A summary judgment was filed in the case of *Robert A. Riddell v. Leon W. Scales, et al.* on February 17, 1966. A Notice of Appeal from this judgment was filed by appellant, Roert A. Riddell, April 15, 1966.

On May 31, 1966, the United States District Court entered a judgment determining that the judgment entered on February 17, 1966, was not a final judgment but only a partial summary judgment.

On March 16, 1967, a stipulated or consent judgment (Appendix "B", p. 2) was prepared in the office of the United States Attorney and signed by counsel for appellant, counsel for appellees, and the United States District Court. No Notice of Appeal was filed from this judgment.

About August 3, 1967, petitioner filed a Motion to Dismiss Appeal based on three grounds: (1) There was no Notice of Appeal filed from any final judgment, (2) The only final judgment in the record was stipulated and consented to and is not appealable under any

circumstances, and (3) No extension of time was granted for filing the record on appeal and docketing the appeal beyond July 14, 1966. The Court of Appeals denied the Motion to Dismiss holding the default in filing the record "not so aggravated as to require dismissal." The Court made no mention of the issue of whether a stipulated or consent judgment is appealable. A subsequent Petition for Rehearing, filed on or about September 2, 1967, was based squarely on the consent judgment issue and was denied on September 18, 1967.

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Court of Appeals for the Ninth Circuit in the instant case is directly in conflict with five decisions of the United States Supreme Court:

Pacific R. Co. v. Ketchum, 101 U.S. 289, 295, 25 L. Ed. 932, 935 (1880);

United States v. Babbitt, 104 U.S. 767, 768, 26 L. Ed. 921, 922 (1882);

Nashville, C. & St. L. Ry. Co. v. United States, 113 U.S. 261, 266, 28 L. Ed. 971, 973, 5 S. Ct. 460 (1885);

Swift & Co. v. United States, 276 U.S. 311, 324, 72 L. Ed. 587, 596, 48 S. Ct. 311 (1928);

N.L.R.B. v. Ochoa Fertilizer Corp., 368 U.S. 318, 323, 7 L. Ed. 2d 312, 313, 82 S. Ct. 344 (1961).

The decision in the instant case is additionally directly in conflict with Federal decisions in the following circuits:

C.A. 1—*Ballot v. United States,* 171 Fed. 404, 405 (1909);

C.A. 2—*Kelly's Trust v. Commissioner,* 168 F. 2d 198, 199 (1948);

C.A. 5—*White & Yarborough v. Dailey,* 228 F. 2d 836, 837 (1955);

C.A. 6—*Pergola v. Penn R. Co.,* 311 F. 2d 837, 839 (1963);

C.A. 7—*Stewart v. Lincoln-Douglas Hotel Corp.,* 208 F. 2d 379, 381 (1953);

C.A. 8—*Walling v. Miller,* 138 F. 2d 629, 631 (1943);

C.A. 9—*United States v. All American Airways, Inc.,* 180 F. 2d 592 (1950);

C.A. 10—*United States v. Star Construction Co.,* 186 F. 2d 666, 669 (1953);

Dist. of Col.—*Curry v. Curry,* 65 App. D.C. 47, 79 F. 2d 172, 174 (1935).

(2) The issue presented is clearly one of importance in the maintenance of uniformity of decisions among the eleven circuits and the Supreme Court. Were the present decision of the Court of Appeals allowed to stand, there could be no certainty of the present position regarding the appealability of stipulated or consent judgments. The Court below has so far departed from the accepted and usual course of following judicial precedent and authority that it is of sufficient importance to justify a grant of *Certiorari.*

(3) The decision of the Court of Appeals is believed to be erroneous and the opposing decisions of the Supreme Court and nine of the Circuit Courts correct. A brief statement, directly in point, from the decisions of

the Supreme Court and the Circuit Courts is more enlightening than a summary of those decisions:

Pacific R. Co. v. Ketchum, supra—"If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, . . ." 101 U.S. at 295;

United States v. Babbitt, supra—"In *R. R. Co. v. Ketchum,* 101 U.S., 289, we decided that when a decree was rendered by consent, no errors would be considered here on appeal which were in law waived by such a consent. . . . The consent to the judgment below was in law, a waiver of the error now complained of." 104 U.S. at 768;

Nashville, C. & St. L. Ry. Co. v. United States, supra—"But the insurmountable difficulty is, that the former decree appears upon its face to have been rendered by consent of the parties, and could not therefore be reversed, even on appeal." 113 U.S. at 266;

Swift & Co. v. United States, supra—"But 'a decree which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.' " 276 U.S. at 324;

N.L.R.B. v. Ochoa Fertilizer Corp., supra—"A decree rendered by consent 'is always affirmed, without considering the merits of the cause.' " 368 U.S. at 323;

Ballot v. United States, supra—"As there was no judgment of the Circuit Court in a just sense of the word [since it had affirmed a consent judgment], there was no error; . . ." 171 Fed. at 405 (C.A. 1);

Kelly's Trust v. Commissioner, supra—"The fact that the appeal was considered shows that the judgment was not by consent, for a consent judgment precludes an appeal." 168 F. 2d at 199 (C.A. 2);

White & Yarborough v. Dailey, supra—"Appeals cannot be taken from agreed judgments such as this one was, and, for that reason alone, the appeal fails." 228 F. 2d at 837 (C.A. 5);

Pergola v. Penn R. Co., supra—"No error can be asserted in the dismissal of the claim under the Federal Employers' Liability Act as this was done with the consent of plaintiff." 311 F. 2d at 839 (C.A. 6);

Stewart v. Lincoln-Douglas Hotel Corp., supra—"It is a generally accepted rule of long standing that a party who agrees or consents to the entry of an order or judgment thereby waives his right to claim that the trial court committed error in the entry of the order." 208 F. 2d at 381 (C.A. 7);

Walling v. Miller, supra—"All errors going to the merits . . . are waived by consent to the decree." 138 F. 2d at 631 (C.A. 8);

United States v. All American Airways, supra—"Such a [consent] judgment is not reversible." 180 F. 2d at 592 (C.A. 9);

United States v. Star Construction Co., supra—"A party is not aggrieved by a ruling regularly made, with his express or implied consent." 186 F. 2d at 669 (C.A. 10);

Curry v. Curry, supra—"For a consent decree, . . . is valid and binding upon all parties consenting, open neither to direct appeal nor collateral attack." 79 F. 2d at 174 (C.A. Dist. of Col.).

Counsel for petitioner, in his research of cases involving consent or stipulated judgments (including the two circuits (3d and 4th) not listed above) has been unable to find any authority holding directly or indirectly that a consent judgment is appealable.

Additionally, it does not appear possible that any exceptions to the rule mentioned in *N.L.R.B. v. Ochoa Fertilizer Corp., supra,* apply. The exceptions mentioned are lack of Federal jurisdiction, lack of actual consent, and fraud in the procurement. The Federal Courts obviously have jurisdiction of tax matters and the fact that the consent judgment (Appendix B, p. 2) was prepared in the office of the United States Attorney and contains the statement, "There exists [sic] no further issues left to be litigated and, therefore, this Stipulated Judgment . . . constitutes a final judgment of this matter," precludes a claim of fraud or lack of consent.

Conclusion.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Dated: 15th day of November, 1967.

Respectfully submitted,

ERNEST R. MORTENSON,
Counsel for Petitioner.

APPENDIX "A".

Order Denying Motion to Dismiss.

Before: CHAMBERS, KOELSCH and DUNIWAY, Circuit Judges.

Sua sponte, the Court orders the six cases listed in the caption consolidated.

The motions to dismiss are denied. Ruby v. Secretary of United States Navy, 365 F.2d 385, 389 (9th Cir.)

The default in filing the records after the final judgments is not so aggravated as to require dismissal.

/s/ Richard M. Chambers
/s/ M. Oliver Koelsch
/s/ Ben C. Duniway
United States Circuit Judges

APPENDIX "B".

Stipulated Judgment.

United States District Court, for the Central District of California.

Leon W. Scales and Kathleen A. Scales, et al., Plaintiffs, v. Robert A. Riddell, Defendant. In Case No. 65-269-PH and the following numbered cases: 65-319-PH; 65-320-PH; 65-469-PH; 65-526-PH; 65-932-PH.

Filed Mar. 16, 1967.

Entered Mar. 16, 1967.

It Is Hereby Stipulated and Adjudged by and between Allen J. Sutherland and Estella W. Sutherland, plaintiffs herein, and the United States of America, defendant herein, through their respective counsel of record, that:

1. The fair market value of the subject 114 acres of real property is $250,000.00.

2. There exists no further issues left to be litigated and, therefore, this Stipulated Judgment coupled with the Judgment entered on February 17, 1966 constitutes a final judgment in this matter.

Dated: March 8, 1967.

/s/ Ernest R. Mortenson
Attorney for Plaintiffs
John K. Van de Kamp
United States Attorney
Loyal E. Keir
Assistant U. S. Attorney
Chief, Tax Division
Donald M. Fenmore
Assistant U. S. Attorney
/s/ Donald M. Fenmore
Attorneys for United States of America

It Is So Ordered this 16th day of March, 1967.

/s/ Peirson M. Hall
United States District Judge

I hereby attest and certify on June 1, 1967 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

John A. Childress
Clerk, U.S. District Court
Central District of California
By Danny Ussery, Deputy
Danny Ussery

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In the Supreme Court of the United States

OCTOBER TERM, 1967

LEON W. SCALES, ET AL., PETITIONERS

v.

ROBERT A. RIDDELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In these six consolidated income tax refund cases, the district court entered three "judgments." On February 17, 1966, the district court entered a "Summary Judgment" ordering that "the defendant refund to" petitioners certain "taxes * * * with interest from the date of payment" on certain "transactions * * * to the extent that such taxes were assessed on the net proceeds as ordinary income and not as capital gain."

On May 31, 1966, upon stipulation of the parties, the court entered a second "Judgment," that set forth the order of February 17, 1966, and recited that the earlier order was only a partial summary judgment, leaving for further litigation the factual issue, common to all six cases, of the fair market value of a half interest in a certain 114 acres of land [1] (Pet. App. 2).

The third, so-called "Stipulated" judgment (Pet. App. 2-3), entered on March 16, 1967, recited the agreement of the parties that the fair market value of this land was $250,000, that no further issues remained to be litigated, and that "therefore, this Stipulated Judgment coupled with the Judgment entered on February 17, 1966 constitutes a final judgment in this matter."

The Court of Appeals for the Ninth Circuit denied petitioners' motion to dismiss respondent's appeal, which was based on the ground, *inter alia*,[2] that no appeal lies from a consented judgment. The appeal remains pending below.

There is no basis for issuance here of a writ of certiorari before final judgment in the court of appeals. Respondent's appeal is in no event taken from a con-

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[1] Another issue concerning the deductibility of certain alimony payments was to be litigated in one of the six consolidated cases.

[2] Petitioners apparently do not reassert here the other two grounds advanced in support of their motion to dismiss: (1) that the court of appeals lacks jurisdiction because respondent's notice of appeal was filed following the order of February 17, 1966; and (2) that respondent's late filing of the record required dismissal.

sented judgment, so that there is no error in the decision below. Nor is there a conflict or any other occasion for review in this Court.

1. These cases are currently pending on the merits in the court of appeals. This Court ordinarily declines to review such interlocutory orders as the one below, unless there is a showing of extraordinary circumstances. See *American Const. Co.* v. *Jacksonville Railway*, 148 U.S. 372. Because there is no greater basis here for review before judgment than such inconvenience as the "final judgment" rule underlying federal appellate review regularly occasions when a motion to dismiss is denied, petitioners should be left to the ordinary course of seeking review here when and if the court of appeals enters a final judgment adverse to their cause. *American Const. Co.* v. *Jacksonville Railway, supra; Chicago, St. Paul &c. Railway* v. *Roberts*, 141 U.S. 690; *U. S. Alkali Assn.* v. *United States*, 325 U.S. 196; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21.

2. The issue here is not, as the petitioners state (Pet. 2), whether a consent or stipulated judgment is appealable, but whether the district court's judgment is a consent judgment. In the orders of February 17 and May 31, 1966, the district court, on the basis of a contested motion for summary judgment, disposed of the question whether money and land petitioners received as holders of certain deeds of trust were taxable as ordinary income or as capital gain. That decision left open a third issue concerning the fair market value of the land. This third issue was the only matter *stipulated* or *agreed* to through the so-called

"Stipulated Judgment" of March 16, 1967. The limited effect of the "Stipulated Judgment" is made plain by its recitation that it was to be "coupled with the judgment entered on February 17, 1966 * * *." Just as plainly, respondent remained free to dispute on appeal the matters decided in 1966 on the basis of an adversarial contest.

The petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

ROBERT N. ANDERSON,
ROBERT I. WAXMAN,
Attorneys.

FEBRUARY 1968.

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